


SO ORDERED.

SIGNED this 6th day of August, 2018.




LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:)	
Daniel Josephus Squires, Jr. and)	
Juaneza Peace Squires,)	Case No. 18-80063
)	
Debtors.)	Chapter 13
_____)	

ORDER DENYING MOTION TO DISMISS

THIS MATTER came before the court on July 12, 2018, upon the Bankruptcy Administrator's Motion to Dismiss. Appearing at the hearing were Brent C. Wootton, counsel for the Debtors, William P. Miller (the "Bankruptcy Administrator"), and Benjamin E. Lovell on behalf of the Chapter 13 Trustee (the "Trustee"). The Debtors were present and testified. All parties having received due and proper notice of the hearing and an opportunity to be heard, and upon consideration of the pleadings, the arguments of counsel, the Debtors' testimony, and the record in this case, the court makes the following findings and conclusions:

FINDINGS OF FACT

On January 29, 2018, the Debtors filed their petition for relief under Chapter 13 of the Bankruptcy Code.¹ On February 22, 2018, the Administrative Office of the United States Courts randomly selected the Debtors' case for an audit under 28 U.S.C. § 586(f)(1), which provides for audits to determine whether a debtor's petition and schedules contain material misstatements concerning income, expenditures, or assets.

The Debtors subsequently made several amendments to their schedules filed with the petition. On March 9, 2018, the Debtors amended Schedule I to add additional income of \$453.81 from a part-time cleaning job. The Debtors also amended Schedule J; the amendments resulted in an increase in net income of approximately \$200.00. On March 12, 2018, the Debtors amended Schedule A/B to add a previously omitted 529 account. On April 5, 2018, the Debtors amended Schedule A/B to add an interest in 2.25 acres of real property in Pamlico County, North Carolina; the Debtors valued the one-fourth interest in property at \$2,196.25. On their amended Schedule A/B, the Debtors also listed an interest in a 1998 Bayliner Trophy boat, which they valued at \$2,000.00. The Debtors also increased the balance in their State Employees' Credit Union account from \$25.00 to \$209.00, and added an interest in a Health Equity HAS account, which they valued at \$2,021.00. The Debtors also listed two 529 accounts, valued at \$4,395.00.

On April 25, 2018, the auditor filed an audit report and document on the docket, setting forth the following material misstatements and omissions in the Debtors' petition and schedules:

- The Debtors did not report an interest in real property located in Pamlico County, North Carolina.

¹ This case is the Debtors' second filing. Given that the Debtors filed their first petition in 1999, successfully completed their case, and received a discharge in 2004, the court finds that this prior filing is of no significance to the matter presently before the court.

- The Debtors did not report the 1998 Bayliner Trophy Boat on Schedule A/B, which the auditor valued at \$10,400.00. The Debtors did not report a 1998 ESCOT boat trailer, which has an average retail value of \$380.00, on Schedule A/B.

- The Debtors did not report a Health Equity HAS account on schedule A/B; the auditor found that the account had a value of \$2,020.93.

In a letter from the auditor to the Bankruptcy Administrator, which is dated April 25, 2018 and attached to the Motion as an Exhibit, the auditor set forth the following additional findings:

- The auditor reported that a Fidelity Blue Cross and Blue Shield 401(k) plan which the Debtors valued at \$176,227.00 had a balance of \$190,333.36.

- The Debtors did not report a SECU savings account on Schedule A/B, but submitted statements showing that the account had a balance of \$90.23.

- The Debtors did not report a Wells Fargo account on Schedule A/B, but submitted statements showing a balance of \$307.26.

- The Debtors valued a Westgate timeshare on Schedule A/B at \$0.00, but did not provide the auditor with supporting documentation.

On June 26, 2018, the Bankruptcy Administrator filed the Motion under 11 U.S.C. § 1307(c). The Bankruptcy Administrator alleges that cause exists to dismiss the case based on lack of good faith in light of the Debtors' misrepresentations and omissions.

At the hearing, the Debtors provided testimony regarding the circumstances that preceded the filing of their petition. The Debtors' financial challenges began when Mr. Squires lost his job around February 2015. During the following year, the Debtors' annual household income dropped from approximately \$98,000.00 to approximately \$38,000.00. Given this significant drop in income, the Debtors found it increasingly difficult to meet their daily expenses. The Debtors have struggled with medical problems since 2016, exacerbating the Debtors' financial challenges. During Mr. Squires'

period of unemployment, the Debtors relied on credit cards to pay daily expenses. The Debtors also withdrew funds from their 401(k) account to pay daily expenses, which resulted in a significant tax penalty. The Debtors set up an installment plan to pay their tax liability, making payments of \$568.00 per month until shortly before filing. The Debtors also made monthly payments on their credit card debt until filing. At the hearing, Mr. Squires reported that prior to filing the petition, he was under significant stress because of his financial and personal obligations.

At the hearing, the Debtors provided credible testimony regarding the misstatements and omissions. Mr. Squires' father, Daniel Joseph Squires, Sr., owned 2.25 acres of land in Pamlico County, North Carolina. Daniel Joseph Squires Sr. died intestate six years before the Debtors filed their petition, and Mr. Squires' sister assisted with the administration of the estate. Mr. Squires noted that he has not visited the vacant land in over six years. The Debtors did not list an interest in the land in their petition because they were not informed of the interest. Nevertheless, after the audit the Debtors amended their schedules to reflect a one-fourth inherited interest in the land, valued at \$2,196.25.

The Debtors explained that they had inadvertently failed to include the 1998 Bayliner Trophy boat in their schedules. The boat, which Mr. Squires has not used in over two years, is sitting on the property of Mr. Squires' daughter. The boat is not currently registered with the North Carolina Wildlife Resources Commission (NCWRC) in light of the fact that it is inoperable and in need of approximately \$3,000.00 in repairs.

Debtors' counsel acknowledged at the hearing that the failure to list the Health Equity HAS account on Schedule A/B was his mistake, and therefore was not the fault of the Debtors. As to the Blue Cross and Blue Shield 401(k) plan, Ms. Squires explained that the auditors' reported balance of \$190,333.36 does not reflect the 401(k) loan that the Debtors had taken out, which explains the discrepancy between the amount the Debtors listed on their schedules and the auditor's valuation. Ms. Squires explained that

although the auditors listed two SECU accounts separately, they are actually one combined account.

The Debtors listed a Westgate Resorts timeshare in their schedules, and valued the timeshare at \$0.00. The Debtors are surrendering their interest in the timeshare, and although the auditor stated that he could not verify this valuation, no party disputes the Debtors' valuation. The Bankruptcy Administrator acknowledged that the Debtors' valuation of \$0.00 was not evidence of bad faith, as timeshares are difficult to value and are frequently of no value to the estate.

ANALYSIS

In the matter before the court, the issue is whether the Debtors' case should be dismissed on the basis of bad faith under § 1307(c). The Bankruptcy Administrator has moved for dismissal on the basis that the Debtors' misrepresentations and omissions in their petition constitute a lack of good faith. The Bankruptcy Administrator cites *In re Sullivan* for the proposition that a debtor's misrepresentations and omissions constitute a lack of good faith, which is cause for dismissal. *Sullivan v. Solimini* (*In re Sullivan*), 326 B.R. 204, 211 (1st Cir. BAP 2005). *Sullivan* is distinguishable from the facts of this case. The *Sullivan* court held that a debtor's fourth, successive Chapter 13 case could be dismissed as a "bad faith" filing because it was an attempt to defeat pending state court litigation. *Id.* at 213. The *Sullivan* court found that the debtor's conduct in previous filings, including plan payment delinquency, and failing to produce documents requested by the trustee, evidenced bad faith. *Id.* In contrast, the Debtors in this case do not have a history of successive filings and there is no evidence that the Debtors filed the petition for an improper purpose, such as to defeat pending litigation.

Under § 1307(c), the court may dismiss a case for "cause." For Chapter 13 cases, § 1307(c) specifically enumerates eleven circumstances in which a court may dismiss a case. Although a lack of good faith is not specifically enumerated as "cause", it is well

established that a lack of good faith (or bad faith) is “cause” for dismissal under § 1307(c). *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 373 (2007) (finding that bad faith can be cause for dismissal under § 1307(c)); *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146, 148 (4th Cir. 1996) (finding that reasons constituting cause for dismissal include the enumerated reasons, as well as judicially constructed ones such as bad faith) (citing *In re Love*, 957 F.2d 1350 (7th Cir. 1992)). In analyzing good faith, courts look at the circumstances of a particular case to determine whether the case should be dismissed. *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 283 (4th Cir. 2008) (citing *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir. 1982)).

In *Deans*, the Fourth Circuit established a non-exhaustive list of factors Courts consider when determining good faith. These factors include the percentage of repayment proposed to unsecured creditors and the period of time payments will be made, the debtor’s financial situation, the debtor’s employment history and future prospects, the nature and amount of unsecured debt, the debtor’s prior bankruptcy filings, the debtor’s honesty in representing the facts, and any unusual or exceptional problems facing an individual debtor or debtors. *Deans*, 692 F.2d at 972. The Fourth Circuit later added a debtor’s pre-petition conduct to its list of factors. *See Neufeld v. Freeman*, 794 F.2d 149, 152 (4th Cir. 1986). Courts have also considered the timing of the petition, how the debts arose and the debtor’s motive for filing, whether the debtor only filed the petition to defeat state court litigation, and whether the debt could be discharged in chapter 7. *See Love*, 957 F.2d at 1357. Under § 1307(c), the party seeking to dismiss the debtor’s case has the burden to prove that the debtor’s bad faith warrants dismissal. *See, e.g. In re Page*, 519 B.R. 908, 913 (Bankr. M.D.N.C. 2014) (citing *Love*, 957 F.2d at 1335).

Having examined the totality of the circumstances in this case, the court finds that the Bankruptcy Administrator has not met his burden of showing bad faith under

§ 1307(c). While several of the factors mentioned above are not applicable in this case, the relevant factors weigh in favor of the Debtors.

The Debtors' financial situation, employment history, and future prospects do not indicate bad faith. The Debtors' filing was precipitated by a year during which Mr. Squires was unemployed. Nevertheless, the Debtors made a consistent effort to repay their debt during this period, including their mortgage, credit card, vehicle, and tax debt. Mr. Squires is working at a full-time job and also has a part-time cleaning job; Ms. Squires also works full-time.

At the hearing, the Bankruptcy Administrator and the Trustee acknowledged that the Debtors had been forthright and honest with the court. The Debtors honesty with the Court in representing their situation weighs heavily in their favor.

Courts often find cause for dismissal on the basis of bad faith where a debtor's omissions and misstatements are egregious or there is evidence that the omissions and misstatements were intentional. *See In re Page*, 519 B.R. 908, 915 (Bankr. M.D.N.C. 2014) (dismissing a Chapter 13 case for bad faith under § 1307(c) where the debtors knowingly failed to report debts owed and failed to amend their petition despite ample opportunity); *In re Tippet*, No. 08-00548-8-JRL, 2008 WL 2020348, at *2 (Bankr. E.D.N.C. May 8, 2008) (dismissing Chapter 13 case under the totality of the circumstances where a debtor filed the petition to defeat pending state court litigation and, without adequate explanation, failed to list thousands of dollars owed to the attorney defending the state court litigation). *See also In re Farber*, 355 B.R. 362, 370 (Bankr. S.D. Fla. 2006) (dismissing Chapter 13 case for cause where, with full knowledge, debtors failed to list the correct amount of their debts, failed to list disputed claims, and misstated whether they had previously filed a Chapter 13 petition.)

The egregious and intentional conduct of debtors in the cases cited above can be distinguished from the Debtors' conduct in this case. Here, the Debtors provided timely responses to the auditor, provided credible explanations for their omissions and

misstatements, and promptly amended their schedules. The court acknowledges that standing alone, the auditor's report and letter give rise to the question of the Debtors' good faith in filing their petition. But the significance of these omissions is lessened by the Debtors' credible explanations for the omissions and the values of the omitted assets. Considering the totality of the circumstances in this case, the court finds that dismissal on the basis of bad faith is not warranted. Therefore, the Motion is DENIED.

END OF DOCUMENT

SERVICE LIST

ALL PARTIES OF RECORD AS OF THE DATE OF THE ORDER SHALL BE SERVED BY
THE BANKRUPTCY NOTICING CENTER